Supreme Court of the United States

OCTOBER TERM, 1945.

No. .

HARRY CIVILETTI,

Petitioner,

v.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

Question Presented, Statement of Case, Statutes, etc.

The statement of the question presented, the statement of the case and the statutes will be found in the petition.

Specifications of Errors and Summary of Argument.

I. The Circuit Court of Appeals erred in holding that the receiving commissions awarded to a New York testamentary trustee in 1940 for services rendered over a period of more than five (5) years, did not constitute compensation paid on completion of the trustee's services within the meaning of Section 107 of the Internal Revenue Code. Such decision is directly contrary in principle to

the decisions of the Supreme Court involving the construction and interpretation of a remedial statute.

II. An important and substantial question of Federal law is involved which has not been, and should be, settled by the Supreme Court.

ARGUMENT.

POINT I.

The Circuit Court of Appeals erred in holding that the receiving commissions awarded to a New York testamentary trustee in 1940 for services rendered over a period of more than five (5) years, did not constitute compensation paid on completion of the trustee's services within the meaning of Section 107 of the Internal Revenue Code. Such decision is directly contrary in principle to the decisions of the Supreme Court involving the construction and interpretation of a remedial statute.

In 1940 the petitioner and his co-trustee filed an intermediate account in the New York Surrogates' Court, and pursuant thereto a decree was entered settling the intermediate account and allowing the petitioner the sum of $31,025.12 for his services in the two trust estates (R. 12). These commissions (referred to by the Court below as *half commissions*) were allowed for receiving principal[1] (R. 22).

[1] The Tax Court in its finding (R. 12) incorrectly stated that the commissions were allowed for "receiving and paying out principal". The fact is that the petitioner received the whole of each trust and paid out no part of it as the opinion of the Court below correctly assumed.

The Court below said with respect to these commissions:

> "It is true that in New York half commissions must be regarded as awarded for services theretofore rendered, and if that is all that Sec. 107 demands the taxpayer at bar would not be excluded by subdivision (b)."

The sole issue, therefore, is the proper interpretation of Subdivision (b) or more specifically the precise scope of the requirement of Section 107 that the compensation be "paid * * * only on completion of such services".

Despite the fact that the Court below regarded the compensation herein as awarded for past services the Court nevertheless held that the compensation was not received on completion of the trustee's services because a trustee's services were considered by it incomplete until the termination of the trust. The Court's position is an illogical one and seems untenable. The services for which compensation was received admittedly were completed to the date of the account. Certainly, had the trustee resigned or been discharged upon the intermediate account or died thereafter, there is no doubt that his personal services would have been complete; the fact that he may continue to perform services subsequent to the date of the account which may be terminated at any time by death or resignation and the compensation for which in all events is absolutely contingent upon his surviving the termination of the trust (*In re Coutt's Will*, 140 Misc. 93) brings into relief the fallacy of the Court's position.

In *Additon* v. *Comm.*, 3 T. C. 427, a member of a liquidating committee of a bank had received compensation for services rendered from 1931 to 1940, but he had

not yet been discharged and some work remained to be done.

The Tax Court said:

> "* * * we consequently view the present question as limited to the narrow issue whether the services for which petitioners received the compensation in dispute can be regarded as having been 'completed' by the time payment was received * * *. Even though the original undertaking was not completed, the part that was paid for had been * * *."
>
> "On such a record we think that all of the services for which compensation was received had been completed at the time payment was made. Since this was the only compensation for these services and since they represented the labor of a period in excess of the five year requirement of the statute, we are satisfied that petitioners have brought themselves within its relief provisions."

The Court below rejected the *Additon* case, *supra*, but it is submitted that no practical distinction can be made between that case and the instant one.

The petitioner contends that under Section 107 (b) the phrase "on completion of such services" refers only to the services for which the compensation was paid.

The commissions of a testamentary trustee in New York in 1940 were separable and based upon two distinct and different sets of services, (1) that of receiving and (2) that of paying out; and the statutory rate of compensation was divided, one-half the rate being allowed for receiving and one-half for distributing or paying out. *Matter of Willets*, 112 N. Y. 289; *In re Barker*, 230 N. Y. 364; *Matter of Busche*, 227 N. Y. 85; *Matter of Morin*, 136 Misc. 823; New York Surrogate's Court Act, Section 285 (printed in Appendix).

By the laws of New York obtaining in 1940 and for more than a century prior thereto, and until the statutory amendments effective September 1st, 1943, no compensation for services respecting the trust estate was due or payable to a testamentary trustee until the same was settled and allowed by a court of competent jurisdiction, as was done in the case at bar.

Surrogate's Court Act (N. Y.), Sec. 285;
Matter of Worthington, 141 N. Y. 9;
Beard v. *Beard*, 140 N. Y. 260;
Matter of Ziegler, 168 App. Div. 735.

The compensation is strictly limited to the percentage or rate of commission fixed by statute.

Matter of Davison, 173 Misc. 323;
Matter of Hurley, 149 Misc. 68;
Matter of Rosenberg, 251 N. Y. 115.

As no further compensation could ever be allowed to the petitioner for receiving, the commission in question at one-half the statutory rate constituted payment in full for this particular service (*In re Coutt's Will*, 140 Misc. 93).

The petitioner, a lawyer, had earned his compensation by personal service, rendered with professional skill, entailing great responsibilities, involving the investing, re-investing, safekeeping, and general care and management of $3,066,110.87 (R. 22), extending over a long period of years. He could not legally be paid until the judicial settlement and allowance of his accounts; and then he received payment in a lump sum. If his income taxes for 1940, the year of the receipt, are to be computed on the

theory that this payment was earned during that one calendar year, the facts would seem to present the ideal example of hardship, inequity and injustice, to remedy which the statute was enacted. *Slough et al.* v. *Comm.*, 147 Fed. (2nd) 836 (C. C. A., 6th Cir.).

We respectfully submit that the decision should be reviewed by this Court and the Writ of Certiorari should be issued because the decision of the Court below conflicts in principle with the decision of this Court that the tax law should be construed with liberality in favor of the taxpayer to afford the relief it was intended to provide. *Bonwit Teller & Co.* v. *U. S.*, 283 U. S. 258.

POINT II.

An important and substantial question of Federal law is involved which has not been and should be settled by the Supreme Court.

The question presented raises an important question of Federal law which has been wrongly decided below and has not been passed upon by this Court. It affects a large number of trustees who receive substantial sums for work performed over extended periods of time and who would otherwise be subjected to an equitable tax burden.

The question is of importance in the orderly administration of the Internal Revenue laws and will continue to arise in various cases throughout the United States until this Court renders an authoritative ruling.

There is presently pending an application for a Writ to this Court in *Smart* v. *Comm.*, 152 Fed. (2nd) 333 (C. C. A. 2nd). The decision in that case was rendered contempo-

raneously with the decision in the instant case. The *Smart* case involves a New Jersey testamentary trustee who received corpus commissions after an extended period of time and who also received income commissions as did the taxpayer herein. The *Smart* case arose under Section 107 as amended by Section 139 of the Revenue Act of 1942 and so far as is relevant to the discussion herein, the only difference between the amendment and Section 107 was the elimination of the completion condition. In the *Smart* case the Court below held that both the income and corpus commissions constitute the "total compensation" within the meaning of Section 107 as amended and that the amount of corpus commissions received in 1941 was less than the statutory percentage.

In the case at bar the same element of income and principal commissions is present but the Court below, did not adopt the theory that income commissions must be added to the receiving commission to determine the "compensation". Indeed the Court below indicated that if the facts at bar had arisen under Section 107 as amended, the petitioner would have been entitled to relief. The two decisions are inconsistent and afford no guide for the proper application of the taxing statute in the case of trustees.

The decision below was erroneously decided and should be reviewed by this Court and a Writ of Certiorari should be issued because the question is of importance in the administration of the Internal Revenue laws and should be settled by this Court. *Detroit Bank* v. *U. S.*, 317 U. S. 329; *Maass* v. *Higgins*, 312 U. S. 443; *Allen* v. *Regents of Univ. System of Ga.*, 304 U. S. 439.

CONCLUSION.

For the foregoing reasons, it is respectfully submitted that the petition for a Writ of Certiorari to the Circuit Court of Appeals for the Second Circuit should be granted.

Dated, New York City, New York, March 5th, 1946.

PAUL O'DWYER,
Counsel for Petitioner.